Petition

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81-1975

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JULES SAINT PRIX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD M. CHIKOFSKY
Attorney for Petitioner
401 Broadway
New York, New York 10013
(212) 431-7040

Question Presented

Whether the warrantless search of an inland marina by the Coast Guard in the absence of probable cause violated petitioner's Fourth Amendment rights.

Parties to the Proceeding

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Jules Saint Prix, petitioner herein, and Glenn H. Hutchison, John Bennett, James T. Blakley and James R. Blakley.

PAGE

Opinion Below 1

Jurisdiction 1

Constitutional Provisions and Statutes Involved 2

Statement of The Case 2

Reason for Granting The Writ 6

The warrantless search of an inland marina by the Coast Guard in the absence of probable Cause violated Petitioner's Fourth Amendment Rights 6

A. Coast Guard's Warrantless Entry into Marina 6

B. The Coast Guard's Destruction of the Telephone Tape 12

Conclusion 14

Appendix: Opinion, United States Court of Appeals for the Second Circuit 1a

CASES CITED

Aguilar v. *Texas* 378 U.S. 108 (1964) 10

Delaware v. *Prouse*, 440 U.S. 648 (1979) 9

Spinelli v. *United States*, 393 U.S. 410 (1969) 10

Steagald v. *United States*, 451 U.S. 204 (1981) 8

United States v. *Bufalino*, 576 F.2d 446 (2d Cir. 1978) 13, 14

United States v. *Canieso*, 470 F.2d 1224 (2d Cir. 1972) 10, 11

PAGE

United States v. *Grammatikos*, 633 F.2d 1013 (2d Cir. 1980) 13, 14

United States v. *Miley*, 513 F.2d 1191 (2d Cir. 1975) 11

United States v. *Miranda*, 526 F.2d 1319 (2d Cir. 1975) 13

United States v. *Paoli*, 603 F.2d 1029 (2d Cir. 1978) 13

United States v. *Piner*, 452 F.Supp. 1335 (N.D. Cal. 1978) aff'd, 608 F.2d 358 (9th Cir. 1979) 7, 9

United States v. *Whitmire*, 595 F.2d 1303 (5th Cir. 1979) 9

United States v. *Williams*, 544 F.2d 807 (5th Cir. 1977) 7, 9

STATUTES AND RULES CITED

Fourth Amendment to the United States Constitution 2

14 U.S.C. 89a 2, 6, 7, 8, 9

21 U.S.C. 846 2

21 U.S.C. 952(a) 2

21 U.S.C. 960 2

28 U.S.C. 1254 (1) 1

Rule 20.1, Supreme Court of the United States 1

MISCELLANEOUS

3 W. La Fave, Search and Seizure: A Treatise on The Fourth Amendment, § 10.8 (Supp. 1981) at 69 ..... 7, 8

Note, *High on the Seas: Drug Smuggling, the Fourth Amendment and Warrantless Searches at Sea*, 93 Harvard L. Rev. 725, 750-51 (1980) 12

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Jules Saint Prix respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Court of Appeals (Feinberg, C.J., Lumbard & Bartels, JJ.) (Appendix, *infra*) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of this Court.

Constitutional Provisions and Statutes Involved

Constitutional Provisions:

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes:

Title 14 United States Code § 89(a). Law Enforcement:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures and arrests upon the high seas and waters over which the United States has jurisdiction for the prevention, detection and suppression of violations of laws of the United States. For such purposes, commissioned, warrant and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance . . .

Statement of the Case

Petitioner was convicted after a jury trial before the United States District Court for the Eastern District of New York (Bramwell, J.) of conspiracy to possess and import marijuana, in violation of 21 U.S.C. § 846, and importation of marijuana and methaqualone, in violation of 21 U.S.C. §§952(a) and 960. Petitioner was sentenced to

concurrent five year terms of imprisonment, to be followed by a two-year term of special parole. The conviction was affirmed by the United States Court of Appeals for the Second Circuit.

On the night of November 11, 1978, the United States Coast Guard, aided by other law enforcement groups, seized the "TERRY'S DREAM," a 78-foot shrimp trawler moored at a small marina on Rockaway Channel in Queens. Although no individuals were present or arrested that evening, the ship's cargo, consisting of 23 tons of marijuana and 499,000 methaqualone tablets, was seized.

Starting with this and other evidence, including a tugboat named the "BILL MATHER," several vans and trucks, and various documents found inside these vehicles, the Drug Enforcement Administration began an investigation that culminated in a six-count indictment against petitioner and fourteen additional defendants.

According to testimony received at a pretrial suppression hearing, the Coast Guard received an anonymous telephone call from a "George" at 9:50 p.m. on November 11, 1978, stating that a fishing boat named Terry's Dream was going up Jamaica Bay with a tug escort scheduled to dock at the 63 Street Sommerville Basin, where four trucks and the vans were waiting to unload her, but without ice. The caller also stated that the fishing boat had been unloaded there three times in the last two years and only late at night.

While this anonymous call was received at 9:50 p.m., no further action appears to have been taken by the Coast Guard until approximately 11:20 p.m., when Coast Guard Group Operations Officer David Van Patten was notified at home of the phone call, proceeded to the Governor's Island Coast Guard Station at 11:35 p.m., spoke with an individual there identified as George, who for the first time

told them that marijuana was being off-loaded from the vessel.*

At this point, Officer Van Patten testified, the Coast Guard notified the local police, U.S. Park Police, DEA and Customs and proceeded by boat to the Yancarib Marina, a trip which took ten minutes.** Upon their arrival, the Coast Guard observed the Terry's Dream docked with the tug Bill Mather tied alongside lengthwise. The Coast Guard thereupon boarded the Terry's Dream where they found various pieces of electronic gear—e.g., radar scanners—which made them "suspicious". Otherwise, they found nothing particularly remarkable in their cursory search of the exterior of the vessel.

They thereupon searched the interior holds of the fishing trawler. They didn't see anything in the aft hold of the vessel, although the officer testified that he "perceived" the scent of marijuana.*** In the forward hold, however, they discovered packages the size of hay bales wrapped in burlap sacks, which upon opening they discovered to contain marijuana. It was not until this point of time—when the marijuana had actually been discovered in the forward hold—that Officer Van Patten testified he radioed the Park Police and the NYPD to move in from their positions outside the land-locked perimeter of the marina's grounds.

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* It was conceded by Officer Van Patten that he had never spoken with the informant before and had no idea as to his track record for reliability.

** Officer Van Patten further conceded that he didn't know what actions had been taken to secure a search warrant or, in fact, whether any actions had been taken at all. Moreover, Detective Miller Edwards of the assisting Park Police testified that he never even inquired whether a warrant had been secured. He merely "assumed" that the department they were assisting "had satisfied all legal ramifications involved."

*** Officer Van Patten admitted that it wasn't until they actually searched the interior holds that they knew marijuana was on board the vessel.

Significantly, however, the testimony of Detective Miller Edwards of the United States Park Service Police was at distinct variance with that of Officer Van Patten as to the time of entry onto the grounds by the backup Park Police and N.Y.P.D. According to Detective Edwards, the police and his forces climbed over the gates onto the property and had secured it with drawn weapons *prior* to the arrival of the Coast Guard and prior to the actual search of the interior holds of Terry's Dream and the discovery of marijuana on board. Thus, it would appear that the actual warrantless intrusion onto the premises and seizure of the marina occurred at a point in time prior to the actual search conducted by the Coast Guard.

Further defense efforts to rebut the bona fides of the Coast Guard's original entry onto the premises—and the underlying probable cause upon which the intrusion was based—were fatally hampered by the Government's inadvertent "destruction" of the tape recording made of the initial telephone conversation between the informant ("George") and the Coast Guard during which the "tip" was first commuciated to the Government on the night of November 11, 1979. While the trial court permitted the Government to introduce a transcript of the tape recording, up defense's request that the tape itself be produced, the Government was constrained to admit that the tape had been destroyed by the Coast Guard within one month after the incident in question. There was thus no way by which to corroborate the bona fides either of the transcript or the informant's tip. Despite immediate defense requests to strike the uncorroborated transcript and the testimony relating to the tape recording and telephone tip. the trial court refused to exclude the evidence.

REASON FOR GRANTING THE WRIT

The warrantless search of an inland marina by the Coast Guard in the absence of probable cause violated Petitioner's Fourth Amendment Rights.

The search that was conducted in this case—ostensibly under the aegis of the United States Coast Guard, but with the active participation of the federal Drug Enforcement Administartion, United States Park Police, Customs Service officers and New York City Police—was conducted without a search warrant and was based upon an uncorroborated "tip" received by the Coast Guard.

As will be discussed below, the entry into the Yancarib Marina without a warrant, based upon an uncorroborated tip from an informant of no proven reliability, was clearly violative of the Fourth Amendment, irrespective of whether it was conducted by the Coast Guard or any other federal agency. Moreover, in light of the Government's blatant misfeasance in destroying the tape recording that formed the basis for the "probable cause" (or "reasonable suspicion") alleged to exist in this case—thus wholly depriving the defense of any reasonable ability to attempt to rebut the Government's allegations in the Court below—the Court, in the proper exercise of its supervisory power, should similarly order that the evidence seized be suppressed.

A. Coast Guard's Warrantless Entry into Marina

In attempting to justify the Coast Guard's warrantless entry, the Government argued below, and the trial court relied upon, the inherent statutory authority of the Coast Guard to conduct warantless searches pursuant to 14 U.S.C. § 89(a), which provides, in pertinent part, that:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures and arrests upon the high seas and waters over which the United States

> has jurisdiction for the prevention, detection and suppression of violations of laws of the United States. For such purposes, commissioned, warrant and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

This statutory language, while facially of almost limitless breadth, still has been more narrowly interpreted by the Courts in proper recognition of the fact that even Coast Guard searches still must pass muster under the strictures of the Fourth Amendment. *See, e.g., United States* v. *Piner,* 452 F.Supp. 1335 (N.D.Cal. 1978) *aff'd,* 608 F.2d 358 (9th Cir. 1979); *United States* v. *Williams,* 544 F.2d 807 (5th Cir. 1977). Indeed, as has recently been observed by one noted commentator:

> While it is fair to say that the statute quoted above confers some authority upon Coast Guard officers beyond that just stated, it may also be concluded that this statutory provision cannot constitutionally be given a broad or even literal reading. That is, it cannot seriously be asserted that under the Fourth Amendment the Coast Guard may, on a whim, seize and conduct a full search of any American vessel found on the high seas.
>
> 3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment,* § 10.8 (Supp. 1981) at 69.

Moreover, the extent to which such limitless authority to conduct random searches presents a 'grave danger' of abuse of discretion in the execution of such searches has led to recognition of the need for stringent regulation of

the circumstances under which such authority may be exercised:

> Moreover, Coast Guard officers are not even specialists in the sense of the just-named officials. Their responsibilities include "enforcing any law of the United States", as to which they are deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law." Thus, it is only recognizing human nature and not singling out the Coast Guard for disparagement to suggest that officers with such broad responsibilities would be tempted to utilize their safety-documentation inspection authority as a means to further those other law enforcement interests. Certainly such uses of the inspection system are not discouraged by the rule that "the validity of the safety and documentation inspection" is not tainted by "prior suspicion of the presence of drugs, or the suggestion by a drug enforcement agency that inspection be made."
> *Id.* § 10.8 at 76-77 (1981 Supp.).

In the instant case, the Government sought to justify the basis for the search conducted here—a search conducted pursuant to an uncorroborated tip provided by an informant of unknown reliability—upon the alternate bases that (a) the inherent authority of 14 U.S.C. § 89 permits the Coast Guard to make random searches virtually at whim, or, failing that, (b) that the informant's tip provided sufficient probable cause to justify the intrusion.* Neither rationale can withstand serious analysis.

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* Insofar as the Goverment may seek to argue in this Court that petitioner lacks the requisite expectation of privacy to contest the search, this Court should be made aware that the Government never contested petitioner's standing in the District Court and, accordingly, should be barred from belatedly raising the issue in this Court. *Steagald* v. *United States*, 451 U.S. 204 (1981). In any event, petitioner, as proprietor of the marina, had a reasonable expectation of privacy in the marina as well as all vessels docked on the premises.

First, with regard to 14 U.S.C. § 89(a), the Coast Guard does not have unlimited authority either to conduct night-time inspection searches of vessels nor to conduct the search of a boat docked at a marina situated on an inland waterway. In *United States* v. *Piner, supra,* 608 F.2d at 361, the Ninth Circuit, relying upon *Delaware* v. *Prouse,* 440 U.S. 648 (1979), invalidated routine, random warrantless night-time safety and document searches by the Coast Guard in the absence of articulable suspicion to suspect noncompliance with marine regulations. The Ninth Circuit flatly rejected the Government's contention that *Prouse* should be distinguished because of the "necessity" of random boating stops. *Id.* at 361. Instead, the Court found that the Government had not met its burden of showing that the Government's interest in maritime safety outweighed the subjective intrusion of such a stop.

Similarly, in *United States* v. *Williams, supra,* the Fifth Circuit held that, irrespective of the power of the Coast Guard and Customs Service to search vessels on the high seas, where a vessel is docked at an inland marina, there must be at least reasonable suspicion that the vessel has been in international water or is within the area of customs' concern before it may routinely be boarded to conduct a search. 544 F.2d at 811; *United States* v. *Whitmire,* 595 F.2d 1303, 1315 & n. 35 (5th Cir. 1979).

In the instant case, the Government made no attempt whatsoever to even attempt to justify the search in this case on the basis either of a routine safety inspection, or alternatively, the routine inspection of an American vessel in international waters. Rather, it sought to justify the search on the basis of the probable cause generated by the informant's tip. Upon that basis, it is similarly clear that the informant's tip and the circumstances that surrounded it provided an insufficient basis upon which to conduct a full-scale warrantless search of the Terry's Dream as it sat docked at the Yancarib Marina.

It is clear that, before an informant's tip properly may be relied upon to establish probable cause, the tip first must meet the "two-pronged" test of *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969), that (1) the informant be demonstrated to be a reliable person, and that (2) the underlying circumstances by which the information was obtained were such that it was probably accurate. *United States* v. *Canieso*, 470 F.2d 1224, 1229 (2d Cir. 1972).

Applying the *Aguilar-Spinelli* standard in this case, it is manifest that the informant not only had no significant indicia (or track record) of reliability, but, moreover, the only corroboration provided prior to the Coast Guard's search below decks was innocent corroboration at most.*

As noted in the testimony of Officer Van Patten, the tip in the instant case came from a telephone call placed by an anonymous informant (who identified himself only as "George") and who said merely that a fishing trawler was proceeding through Rockaway Basin to a marina where trucks were waiting to unload it "without ice". No mention of marijuana apparently was made in this conversation.** And it was not until a later meeting at the Coast Guard headquarters—at 11:30 p.m.—during which marijuana was mentioned for the first time. There was no evidence submitted as to this informant's reliability, or any proven record for giving accurate corroborated information. Nor for that matter was there any corroboration of any suspicion of criminal activity at the marina site prior to the intrusion of the Coast Guard below the decks of the trawler.

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* Officer Van Patten conceded on cross-examination that the Coast Guard didn't know until they actually searched below decks that there was marijuana on board the vessel.

** "Apparently"—because the Government destroyed the tape recording of this conversation.

Under the circumstances, then, where the informant was an individual of untested reliability, with no prior track record (or suggestion of special reliability such as having been a participant in the crime (*United States* v. *Miley*, 513 F.2d 1191, 1204 (2d Cir. 1975)), the merely innocent corroboration provided prior to the entry below decks was insufficient to sustain the full-scale warrantless intrusion engaged in here.

In this regard, in evaluating the weight to be placed on the information supplied by an informant and its subsequent corroboration as a basis for probable cause, the appropriate standard has been enunciated by Judge Friendly:

> "The lesson we draw from all this is that *Aguilar* applies with full rigor only when . . . the arrest depends solely on the informer's tip. When a tip not meeting the *Aguilar* test has generated police investigation and this has developed significant corroboration or other '*probative indications of criminal activity* along the lines suggested by the informant,' [citation omitted], the tip, even though not qualifying under *Aguilar*, may be used to give such additional color as is needed to elevate the information acquired by police observation above the floor required for probable cause." [Citation omitted.] *United States* v. *Canieso, supra*, 470 F.2d at 1231 (emphasis in original).

Clearly, then, under these standards, in light of the informant's undemonstrated reliability as well as the agents' failure in surveillance to corroborate his information through *any* incriminating activity during the course of a routine inspection of the vessel above decks, the warrantless intrusion into the forward and aft holds below deck—as well as the other agents' intrusion onto the marina's property *prior* to the Coast Guard's inspection was clearly improper.

Moreover, contrary to the holding of the Court of Appeals in this case, the mere fact that the search was conducted by the Coast Guard does not, by itself, dispense with the Fourth Amendment's probable cause requirements. Indeed, as one commentator recently has noted:

> In ruling on the constitutionality of warrantless vessel searches, courts have generally failed to apply established fourth amendment principles in an analytically sound manner . . .
>
> By far the most urgent need is for major changes in the present system of administrative searches of vessels, which under current practice gives the Coast Guard virtually unlimited power to make warrantless searches without probable cause. Legislative and administrative action may be necessary to implement the most desirable solution . . . but courts should not hesitate to enforce the guarantees of the fourth amendment in the absence of such action. While restricting the present authority of the Coast Guard will probably reduce its effectiveness in stopping drug traffic to some extent, it should be remembered that "[t]he Court [which] . . . sat during a period in our history when the Nation was confronted with a law enforcement problem of no small magnitude—the enforcement of the Prohibition laws [—] resisted the pressure of official expedience against the guarantee of the Fourth Amendment."

Note, *High on the Seas:. Drug Smuggling, the Fourth Amendment and Warrantless Searches at Sea,* 93 Harvard L. Rev. 725, 750-51 (1980).

B. The Coast Guard's Destruction of the Telephone Tape

As noted above, the questions relating to the informant and the information conveyed by him in his telephone call to the Coast Guard were crucial to the determination of whether the Coast Guard had sufficient probable cause or

reasonable suspicion by which to conduct a warrantless search of the Terry's Dream.

Unfortunately, however, the Government totally frustrated the defense's efforts to make an objective factual determination as to the circumstances under which this information was conveyed. While presenting a typed and transcribed version of the telephone conversation, the Government did not reveal, until pressed to do so at the conclusion of the hearing, that the *actual* tape from which this transcript was made was destroyed by the Coast Guard one month after it was made and, thus, was unavailable for the purposes of the hearing. The trial court refused to strike either the transcript of the tape or testimony relating to it on the grounds that since the Governmen's destruction of the tape was routine and presumably not motivated by improper motive the error was harmless. The District Court's decision in this regard was clear error.

In a continuing series of decisions, the Courts of Appeals have repeatedly warned the Government that it courts reversal each and every time it destroys tape recordings, notes, and documents required to be produced for the defense or necessary for the Court to make a fair and objective determination of the issues before it. *See, e.g.*, *United States* v. *Miranda*, 526 F.2d 1319, 1324 & n.4 (2d Cir. 1975); *United States* v. *Bufalino*, 576 F.2d 446, 449 (2d Cir. 1978); *United States* v. *Paoli*, 603 F.2d 1029, 1036 (2d Cir. 1978); *United States* v. *Grammatikos*, 633 F.2d 1013, 1025-26 (2d Cir. 1980) (Oakes, J. ,dissenting).

As the Second Circuit warned in *Bufalino:*

> While we have decided that the special circumstances of the instant case militate against reversal on this ground, we will look with an exceedingly jaundiced eye upon future efforts to justify nonproduction of a Rule 16 or Jencks Act "statement" by reference to "department policy" or "established

> practice" or anything of the like. There simply is no longer any excuse for official ignorance regarding the manadate of the law. Where, as here, destruction is deliberate, sanctions will normally follow, irrespective of the perpetrator's motivation, unless the Government can bear the heavy burden of demonstrating that no prejudice resulted to the defendant.
>
> *Id.*, 576 F.2d at 446

Accordingly, it is submitted that the Court should reverse the denial of defendant's suppression motion and either direct that the evidence seized be suppressed or, in the alternative, that the trial court conduct a further evidentiary hearing into the question of probable cause and the Government's destruction of the informant's telephone tape. *United States* v. *Grammatikos, supra.*

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
April 23, 1982

Respectfully submitted,

Edward M. Chikofsky
Attorney for Petitioner
401 Broadway
New York, New York 10013
(212) 431-7040

Appendix

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 492-496—August Term, 1981

(Argued: December 1, 1981 Decided: February 22, 1982)

Docket Nos. 81-1214-1218

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

JULES SAINT PRIX, GLENN H. HUTCHISON, JOHN BENNETT, JAMES T. BLAKLEY and JAMES R. BLAKLEY,

Defendants-Appellants.

Before:

FEINBERG, *Chief Judge*, and LUMBARD, *Circuit Judge*, and BARTELS, *District Judge*.*

Defendants were convicted of importing and conspiring to import narcotics after a six-week jury trial before Bramwell, *J.*, E.D.N.Y. They appeal, alleging error in the admission of evidence seized in a warrantless search, and challenging various trial rulings.

Affirmed.

* Honorable John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

Appendix

ANNE C. FEIGUS, ESQ. and JOHN L. POLLOK, ESQ., New York, N.Y. (Hoffman Pollok & Gasthalter, New York, N.Y., Ronald Rubenstein, Esq., of counsel), *for defendant-appellant James R. Blakley.*

JOEL B. RUDIN, ESQ., New York, N.Y., *for defendant-appellant James T. Blakley.*

MAURICE M. MCDERMOTT, ESQ., New York, N.Y., *for defendant-appellant John Bennett.*

EDWARD M. CHIKOFSKY, ESQ., New York, N.Y., *for defendant-appellant Jules Saint Prix.*

RONALD P. FISCHETTI, ESQ., New York, N.Y., *for defendant-appellant Glenn H. Hutchison.*

SUSAN E. SHEPARD, Assistant United States Attorney, Brooklyn, N.Y. (Edward R. Korman, United States Attorney, Eastern District of New York, Vivian Shevitz, Assistant United States Attorney, of counsel), *for appellee.*

LUMBARD, *Circuit Judge:*

On the night of November 11-12, 1978, the United States Coast Guard and other law enforcement agencies seized 23.4 tons of marijuana and 499,000 pills of methaqualone found in vehicles and aboard a fishing boat at the Yancarib Marina on Jamaica Bay, Queens, New York. Subsequent investigation discovered that the seizure had terminated a massive conspiracy to import drugs, beginning with the purchase of the shrimp boat TERRY'S DREAM in November 1977 and continuing through three trips between Colombia and New York. Fifteen people were indicted in the Eastern District of New York on various counts of possession and conspiracy;

ten were tried[1] and five were found guilty after a six-week jury trial before Judge Bramwell (E.D.N.Y.). They appeal. Jules Saint Prix, lessee and operator of the Yancarib Marina, argues that seizure of the drugs violated his fourth amendment rights. James R. Blakley, his son James T. Blakley, John Bennett and Glenn H. Hutchison challenge various trial rulings.[2] We affirm.

A caller identifying himself only as "George" phoned the Coast Guard station at Governors Island from a New York City tavern at 9:50 p.m. on November 11, 1978.[3] He said a

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[1] Of the other five named in the indictment, three are fugitives from justice. Judge Bramwell severed the trial of the remaining two, Joseph Dazzo and Richard Mastrangelo, because their counsel was unavailable. Dazzo was convicted after a jury trial before Judge Weinstein on counts of conspiracy and possession. The case against Mastrangelo was dropped when the government's key witness was shot dead on the day he was to testify at trial. Oral argument in Dazzo's appeal was heard at the same time as the argument in this case, and the decision is reported at — F.2d — (1982).

[2] All appellants were convicted of one count of conspiring between November 10, 1977 and November 11, 1978, to possess and import marijuana in violation of 21 U.S.C. § 846 (1976). James R. Blakley and his son, James T. Blakley, were also convicted of one count of importing marijuana into the United States in August, 1978, in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2 (1976); Jules Saint Prix and John Bennett were also convicted of one count of importing marijuana and methaqualone tablets into the United States in November 1978 in violation of 21 U.S.C. §§ 952(a), 960, and 18 U.S.C. § 2 (1976).

Bennett was given the maximum sentence of five years imprisonment on each count, plus a special parole term of 10 years. The Blakleys were sentenced to five years on each count, the sentences to run concurrently, but Blakley senior was to serve only six months in jail followed by a parole term of 10 years on account of his poor health. Saint Prix was sentenced to five years for conspiracy and five years for the substantive offense, plus a 2-year special parole term—the sentence for the substantive offenses to run concurrently with the prison term for conspiracy. Glenn H. Hutchison was given the maximum sentence of five years imprisonment.

[3] The informer's call to Governors Island was recorded on a machine with a 30-day loop of tape. The Coast Guard transcribed the call, but neglected to preserve the recording, which was automatically recorded over and erased 30 days later. The informer was never identified. Defendants objected to any use of the transcript, which was admitted in the suppression hearing but not at trial. Our analysis of the suppression hearing in no way depends on information supplied by the informant.

tug and a shrimp boat were expected at the Yancarib Marina in Queens, and that men with vans and trucks were waiting to unload the boats. He said none of the vans and trucks had any ice—indicating that they were expecting to unload not fish, which must be refrigerated, but a somewhat hotter cargo of narcotics. It took an hour and a half for this information to reach Lieutenant David Van Patten, acting group operations officer at the Coast Guard station at Rockaway, who had jurisdiction over Queens. Called at home at 11:20 p.m., Van Patten reached the Rockaway station by 11:35. "George" was at the station; he told Van Patten that about 25 men were unloading bales of marijuana at the marina. Van Patten told the duty officer to order land based police to the marina, and left for the marina aboard an unlit 41-foot utility boat.

The Yancarib Marina comprises about two acres of woods and marsh, a clearing which contains a few buildings, and piers extending into the Somerville Basin of Jamaica Bay. The marina fronts on two city streets with row houses across one street and a vacant lot across the other; on the third side is a junk yard and on the fourth side is Somerville Basin. A cyclone fence demarcates the land borders of the marina. Detective Miller Edwards and his partner from the United States Park Police arrived at the marina first. They climbed over the fence, and with guns drawn felt their way along the bulkhead at the marina's shoreline. They found nobody. They watched the Coast Guard cutter swing alongside a 50-foot tugboat which was lashed to a 75-foot shrimp boat.

Lieutenant Van Patten found the tugboat and the shrimper as described by the informer. He and his crew boarded the tugboat, which was called the BILL MATHER. They then climbed onto the shrimper TERRY'S DREAM. Van Patten smelled marijuana in the afterhold—a cargo compartment in the back of the boat—but the hold was empty. He entered the pilot house, saw sophisticated navigational equipment not usually found on such fishing boats, and touched a cup of coffee which was still hot. The forward hold underneath

the pilot house was nearly filled with 152 60-pound burlap-wrapped bales of marijuana, each measuring approximately 3 by 2 by 2 feet. Some of the bales were labeled "Product of Colombia." The hold also contained cartons of methaqualone pills worth about $1.5 million wholesale.

At some point after the Coast Guard boarded the shrimp boat, Detective Edwards and his partner identified themselves and joined Van Patten aboard the TERRY'S DREAM. Van Patten radioed ground units to move into the marina and he disembarked to begin a search. The Park Police, New York City police, customs officials and agents of the Drug Enforcement Administration participated in the search. No people were found, but the searchers discovered three vans and four 18-20 foot trucks. Two vans were filled with bales of marijuana; one was littered with marijuana scraps. Two trucks were filled with bales; one was partially full. In all, 291 bales were seized from boat and vehicles worth about $15 million wholesale. The police searched the marina office and found mayonnaise, cold cuts, partly made sandwiches, beer and warm coffee—evidence of a recently interrupted meal.

The marina was leased and operated by defendant Jules Saint Prix. The day of the seizure Saint Prix had ordered his employees to build a plywood wall in one of the vans in which marijuana was found to separate the drivers of those vans from loose cargo carried back. Also on the day of the seizure, Saint Prix told his employees to adjust small docks attached to marina piers in order to accommodate the BILL MATHER and TERRY'S DREAM. Both boats had previously docked at the Yancarib Marina. Prior to 1978, Saint Prix was thousands of dollars in arrears on the marina lease, but in 1978, the period of the alleged conspiracy, he paid his $16,600 rent and at least $6,000 more.[4]

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[4] Joseph Falco, president of Falco Construction Corp. which owned the Yancarib Marina, gave two different figures for Saint Prix's payments in 1978: $22,500 and $26,500.

Appendix

The history of the TERRY'S DREAM and the BILL MATHER linked the Blakleys to the conspiracy. Records kept by New York City Transit Authority employees at a toll bridge linking Queens with the end of the Rockaway Peninsula show that BILL MATHER and the TERRY'S DREAM left the Rockaways for the Atlantic Ocean in February, August and October of 1978. The February trip was interrupted by the Coast Guard. Petty Officer Jesus Vega boarded the shrimper and smelled marijuana. The commanding officer of Vega's ship, however, decided against searching the boat.[5]

Before the August trip, the conspirators repaired the TERRY'S DREAM at the Lantana boatyard, Lantana, Florida, and worked on the BILL MATHER at the Muller boatyard in Brooklyn. James R. Blakley signed work forms at Lantana. Robert DeGrande, the government's prime witness,[6] testified that he worked with the Blakleys on the TERRY'S DREAM at Lantana, and that he, the Blakleys and others took the TERRY'S DREAM to Colombia, picked up a load of marijuana and returned to New York.

The October trip was preceded by further repairs on the TERRY'S DREAM in September 1978 at the Rivara boatyard in Queens. Maureen Marshall, who worked behind Rivara's lunch counter, identified James R. Blakley. Frederick Ardolino, a tug boat inspector,[7] did not identify the Blakleys but did testify to a "feeling" that the people working on the TERRY'S DREAM were father and son. Records at the International Hotel, Kennedy Airport, for October 1978

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[5] The reason Petty Officer Vega was ordered not to search the boat does not appear in the record.

[6] DeGrande offered his story about the August 1978 trip to the U.S. Attorney after he had been arrested in Michigan on charges of selling cocaine. The Michigan court was notified that DeGrande was cooperating with the U.S. Attorney. DeGrande was convicted and sentenced to lifetime parole.

[7] Ardolino became a witness under the compulsion of an order to testify pursuant to which he was granted immunity.

bore the name "Blakley." The TERRY'S DREAM left Rivara's on October 6, and proceeded to Key West, Florida. James R. Blakley had a room at the Key West Holiday Inn from October 15 to 18; he and his son James T. Blakley signed room service bills at the Inn. The TERRY'S DREAM returned to New York on November 11 to be seized by the Coast Guard.

One of the cars parked at the marina on the night of the seizure was a 1974 Buick registered to the defendant John Bennett. The keys to Bennett's car were found on a desk in the marina office, amidst the abandoned sandwiches and drinks. Ardolino testified that Bennett purchased the BILL MATHER in January 1978 at the Loveland boatyard in Norfolk, Virginia for $59,000* cash on behalf of the "J&L Towing Co." of 302 London Road, Staten Island, New York. The company was fictitious but the address was real. It was a house owned by Bernard D'Aquila, who rented the house in 1977-78.* D'Aquila testified that a man identifying himself as "John Bennett" answered the phone at 302 London Road; the man said that he lived there from time to time. Someone using the name "Bennett" paid the Robin Ford dealership on Staten Island $8,000 cash towards the purchase of two of the vans in which marijuana was found. Bennett also purchased a Harley-Davidson motorcycle for $4,000 cash in 1978. Bennett filed no tax return for 1978; the source of cash that paid for the boat and motorcycle was unexplained.

In the glove compartment of Bennett's Buick was a temporary New York State insurance identification card for the

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* Bennett under the name "John Ward" offered the Loveland $59,000 cash. The company asked for a check instead. Bennett proceeded to buy a cashiers check for that amount from a local bank. When the bank asked for identification, Bennett said he had none with him. Ardolino, who accompanied Bennett to Virginia to advise him on tugboats, offered his identification, which the bank accepted.

* D'Aquila rented his house to Charles Dazzo, the father of Joseph Dazzo, the conspirator who was tried and convicted in a separate trial.

defendant Glenn Hutchison. D'Aquila identified Glenn Hutchison as someone living at 302 London Road. Someone using the name Glenn Hutchison showed up at Robin Ford to purchase one of the marijuana vans. When the BILL MATHER was repaired at the Muller boatyard in April 1978, the repairs were paid for with money orders bought from Security Federal Savings & Loan, Staten Island. The hand printing on the money orders was identified as Glenn Hutchison's handwriting. Hutchison spent almost $22,000 on a BMW and a Harley-Davidson motorcycle in 1978. He, too, failed to file a tax return, and the income supporting those purchases remained unexplained.

The legality of the search on November 11-12 is the central issue on appeal. Saint Prix argues that the evidence should have been suppressed because the search was made without a warrant in violation of his fourth amendment rights. At the pre-trial suppression hearing, Judge Bramwell ruled that the Coast Guard's warrantless search of the TERRY'S DREAM and the BILL MATHER was authorized by 14 U.S.C. § 89 (1976), and therefore not subject to the usual warrant requirements. Judge Bramwell found that the Coast Guard faced exigent circumstances as the search of the boat indicated that the crew had just left. This, coupled with the Coast Guard's authority to search for contraband under 19 U.S.C. § 482 (1976), justified their search of the marina under the fourth amendment. He denied defendant's motion to suppress. We affirm for reasons which differ from those of the district court.

The Coast Guard's search of the TERRY'S DREAM cannot be challenged by Saint Prix because he had no "legitimate expectation of privacy" in the vessel. Only a defendant whose own privacy has been invaded can exclude evidence taken during the invasion. *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). Saint Prix merely rented dock space to the TERRY'S DREAM. The Coast Guard touched nothing of Saint Prix's, invaded no area under his control and infringed no property right of his by boarding the TERRY'S

DREAM. The search violated no right of his, and he cannot exclude its fruits. *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

On boarding the vessel, the Coast Guard found large quantities of marijuana and indications that more had recently been unloaded.[10] They found sophisticated electronic navigational equipment which was not common to such fishing boats. They had reasonable certainty that the TERRY'S DREAM—an ocean going shrimp boat—had carried marijuana to the Rockaways from somewhere beyond the ocean border of the United States. They had, in short, reasonable certainty that the TERRY'S DREAM had crossed the border. When Lieutenant Van Patten ordered the marina searched, he was searching for contraband which he was reasonably certain had just entered the United States from the high seas. We think the search of the vans and trucks at the marina was a "border search" and thus reasonable under the fourth amendment.

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[10] We do not believe the Coast Guard faced "exigent circumstances" justifying the search of the marina. The transcript of the suppression hearing—which no counsel saw fit to include in the appendix or even in the original record—discloses that Detective Edwards and his partner penetrated the marina and traversed its shoreline without seeing anyone well before the Coast Guard boarded the TERRY'S DREAM. These facts hardly paint a picture of exigent circumstances in view of the numerous other law enforcement officers then present.

Edwards' trespass, however, does not give Saint Prix grounds to suppress evidence. Edwards discovered nothing during his trespass, and he gave Van Patten no information contributing to the success of the later search. A fourth amendment violation which produced no evidence and led to none gives Saint Prix no grounds to protest the subsequent and independent search of the vehicles on his property. *See United States v. Allen*, 633 F.2d 1282, 1291 (9th Cir. 1980), *cert. denied*, 50 U.S.L.W. 3246 (1981).

The "border search" exception does not justify searches of homes or business establishments such as the offices of the Yancarib Marina. *United States v. Ramsey*, 431 U.S. 606 616 (1977). But the evidence from the marina office was not used against Saint Prix in any explicit fashion, nor did it lead to other evidence used against him. Its effect on Saint Prix's trial was negligible; therefore, admission of evidence from the marina office was harmless error as far as Saint Prix was concerned. The fact that the keys to Bennett's car were found in the marina office amidst the abandoned dinner was used against Bennett by the government, but Bennett has no legitimate expectation of privacy in Saint Prix's office, and cannot exclude the fruits of its search.

Searches without a warrant and even without probable cause do not violate the fourth amendment if they are "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons or property crossing into this country." *United States v. Ramsey*, 431 U.S. 606, 616 (1977). *See* Note, *High on the Seas: Drug Smuggling, the Fourth Amendment and Warrantless Searches at Sea*, 93 Harv. L. Rev. 725, 731-38 (1980). The "border" is an elastic concept; its precise limits depend on the facts of each case. *United States v. Ajlouny*, 629 F.2d 830, 834 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981). We have held that the "border area" includes public streets adjacent to New York City's docks, so that customs officials may conduct border searches in that area. *United States v. Glaziou*, 402 F.2d 8, 12-13 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969). The Fifth Circuit has upheld the "border search" of a truck after it had traveled two miles from a marina. *United States v. Hill*, 430 F.2d 129 (5th Cir. 1970). Here the trucks were searched while they were still in the marina.[11] *See also United States v. Tilton*, 534 F.2d 1363 (9th Cir. 1976) (boat on trailer, parked at lot outside marina, was subject to border search); *United States v. Beck*, 483 F.2d 203, 208 (3d Cir. 1973) (watchmen's car stopped half mile from pier and subjected to border search), *cert. denied*, 414 U.S. 1132 (1974); *United States v. McGlone*, 394 F.2d 75 (4th Cir. 1968) (car stopped in parking lot adjacent to harbor and subjected to border search).

The other arguments raised by appellants are without merit. Hutchison contends the Robin Ford sales slips bearing

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[11] The fact the truck in *Hill* was mobile, and the ones here were parked, is of no moment. The authority to conduct a "border search" under the fourth amendment does not depend on exigent circumstances. The Fourth Circuit upheld as reasonable under the fourth amendment the warrantless search of an imported camper which had been under the control of customs for days and was then in a customs warehouse. *United States v. Gallagher*, 557 F.2d 1041 (4th Cir. 1977).

his name should not have been submitted to the jury because they were hearsay. But the sales slips were not admitted to prove that Hutchison bought the vans. They were admitted to prove that someone using Hutchison's name bought the vans, from which the jury could infer that the person using Hutchison's name was Hutchison himself. Admission for this purpose is permissible so long as other evidence connected Hutchison with the person using his name. *United States v. Lieberman*, 637 F.2d 95, 101 (2d Cir. 1980). Such evidence is in the record. Hutchison lived at 302 London Road, the address at which Bennett registered the BILL MATHER and at which Bennett lived. Bennett provided the cash for the vans bought at Robin Ford.

The Blakleys raise various objections to Judge Bramwell's rulings on evidence. James T. Blakley argues Ardolino should not have been allowed to testify that he, Ardolino, believed workers on TERRY'S DREAM included a father-son team. This was no more than Ardolino's opinion from facts he had observed, and thus admissible. Fed. R. Ev. 701. James R. Blakley contests Maureen Marshall's identification of him as a worker on the TERRY'S DREAM, on the grounds that suggestive photo arrays were shown to Ms. Marshall when she testified before the grand jury. Three times Ms. Marshall picked out a photo from arrays before the grand jury. She picked out James R. Blakley from the two arrays that contained his photo; she picked out another person from a third array which did not include James R. Blakley's photo. James R. Blakley argues that Judge Bramwell prevented effective cross examination of Ms. Marshall on her prior inconsistent identification. The record does not support these claims. Cross examination of Ms. Marshall was thorough. She was repeatedly questioned about her prior inconsistent identification. The photo arrays appear to have been properly constructed. Ms. Marshall viewed James R. Blakley every day for a period of weeks. Permitting her to identify James R. Blakley in court was not error.

The Blakleys protest that records from the International

Hotel at Kennedy Airport should not have been admitted because the identification of the Blakleys as hotel guests was hearsay. But the government provided substantial evidence corroborating the hotel records, as required by *Lieberman, supra*. Maureen Marshall testified that the Blakleys told her they were staying at the International Hotel. Phone records showed calls made from the hotel to the Blakley home in Fort Myers, Florida. It was not error to admit the hotel records.

Bennett contends that D'Aquila should not have been allowed to testify that a man calling himself Bennett answered the phone at 302 London Road. Bennett failed to raise this objection at trial; at any rate, D'Aquila's testimony would be admissible under *Lieberman* to show that someone answered and gave Bennett's name. That is how the prosecution used D'Aquila's testimony in summation. Bennett also argues that the government should not have been allowed to show that he failed to file any tax returns for 1978 where the government's only evidence of Bennett's sudden accession to wealth was the purchase of a $4,000 motorcycle. Bennett argues that a $4,000 purchase does not show great wealth in these inflationary times. But this misses the point of the evidence. Bennett made this purchase in cash. He also laid out $59,000 cash for the BILL MATHER. In a narcotics prosecution, it is well established that the government may introduce evidence of cash purchases coupled with tax evidence tending to show that a defendant had no legitimate source of cash. *United States v. Viserto*, 596 F.2d 531, 536 (2d Cir. 1979). The tax evidence may include the failure to file tax returns. *United States v. Hinton*, 543 F.2d 1002 (2d Cir.), *cert. denied*, 430 U.S. 982 (1977). Given Bennett's use of $63,000 cash in 1978, we do not think Judge Bramwell erred in permitting the government to show that Bennett filed no tax returns in 1978.

We have considered the other arguments by the appellants, and we conclude that they do not merit discussion.

Affirmed.